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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

LAKESHA FOY,

Defendant and Appellant.

F069477

(Fresno Super. Ct. No. F11905685)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman, and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Detjen, Acting P.J., Franson, J. and Peña, J.

Defendant Lakesha Foy was convicted by jury trial of arson of an inhabited structure (Pen. Code, § 451, subd. (b))¹ and first degree residential burglary (§§ 459, 460, subd. (a)). She admitted suffering a 2002 conviction for assault with a firearm (§ 245, subd. (a)(2)), which qualified as both a prior strike conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). Defendant made a *Romero*² motion, requesting that the trial court exercise its discretion to dismiss the prior strike allegation pursuant to section 1385. After hearing argument, the court denied the motion. The court sentenced defendant to 15 years in prison: the five-year midterm on the arson count, doubled to 10 years due to the prior strike conviction, plus a five-year enhancement for the prior serious felony conviction, and a stayed eight-year term on the burglary count. On appeal, defendant contends the trial court abused its discretion in declining to dismiss her prior strike conviction. We affirm.

FACTS

Defendant and Ellery Green had been in a relationship in 2008 or 2009. On February 11, 2011, defendant was in town and they got together. Green picked her up at her cousin's house and they went to a barbeque at a friend's house and started drinking at about 6:00 p.m. Later, Green saw defendant flirting and dancing seductively, getting the men's attention. He told her they were leaving. He took her back to her cousin's house, but she refused to get out of the car because Green would not tell her why they had left the party. She yelled and slammed her fist on the center console. He told her to just get out. He said he did not have to answer to her. As they yelled at each other, people started to gather. Green did not want to make a scene, so he left and drove back to the barbeque. He told defendant she could stay at the barbeque and dance, but again she

¹ All statutory references are to the Penal Code.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

refused to get out of the car. He went inside and brought out his uncle and a few other men. Green told defendant she could stay at the party and his uncle would take her home later. She repeatedly slammed her fist on the console and said, “I’m not getting out. You can’t make me get out of this mother fucking car.” Neighbors came out and Green realized they were causing a scene. His uncle told him, “Just take her home. Just get her away from here. Maybe she want to lay down or whatever.” So Green took her to his apartment and they continued arguing about his not telling her why they left the party.

When they reached Green’s apartment near Marks and McKinley, which was a single-level apartment connected to three other apartments, Green was really feeling the effects of the alcohol, so he got in bed. Defendant joined him, but began texting and talking on her cell phone. He was getting nervous because he had lived with her in the past and things never went well. He did not want the arguing to continue. After 15 or 20 minutes, he got up and walked out of the room. He asked her to leave the apartment, but she told him she did not have to leave. He came back and said, “What you mean you don’t have to go nowhere. This is my house.” She told him, “You can’t make me go nowhere. You’re a punk. You’re a bitch.” They argued and she repeatedly called him a punk and told him he could not make her go anywhere. When she grabbed him by the collar, he had had enough. He told her that if he could not make her leave, he knew someone who could, and he called 911. He told the dispatcher he did not want to press charges; he just wanted defendant out of his apartment.

Defendant ran to the bathroom and threatened to cut herself with one of Green’s miniature ornamental swords. He told her she was going to have to leave. She began making sawing motions with the blade across her wrist (the blade was not sharp but the tip was). Then she pointed the knife at Green, about six to 12 inches away from him, as he continued speaking to the dispatcher. Green told defendant that the police were coming. He started pacing because he could not believe what was happening. Defendant was going in and out of the bathroom. Green was still on the phone with the dispatcher

when officers knocked on his door. Defendant was upset and uncooperative with the officers. She felt she had a right to be there. The officers asked her to leave and she eventually agreed.

Because of defendant's behavior, Green was afraid of what might happen if he stayed at his apartment. He packed a bag and left. Defendant was in the parking lot making phone calls and the police were still present. Defendant was angry and she yelled at Green, "I'll be right here. I'll be right here waiting for you [']cause you know how I get down.'" Green took this as a threat.

Green drove a few miles to a friend's house and passed out when he got there around 10:00 or 11:00 p.m. Shortly after midnight, he woke up and realized his cell phone was buzzing and notifying him he had received multiple texts and voice messages. There were messages from his neighbors telling him he needed to come home because his apartment was on fire. There was also a voice message from defendant, saying something to the effect that she was sorry for what she had done. He rushed to his apartment and saw the fire trucks. The fire at his apartment had already been put out. His bedroom window was broken. The investigator later concluded the window was broken prior to the fire and an ignitable liquid had been applied to the mattress. The fire had been set intentionally.

Green's mother received a call immediately after the fire stating that Green would be dead by dawn. She called Green and asked him what was going on. She said someone had called her. He told her his apartment had been burned. He was concerned for his mother's safety because she lived alone, so he called the friend he had stayed with and asked her to go to his mother's house. He told the investigating officers to meet him there. Green had received 10 or 15 voice mails from defendant, which he took as threats. The investigator recorded all of them.³

³ Some of the messages were played for the jury.

As the investigator was listening to the messages on Green's phone, Green continued to receive calls from defendant. Green called her back in a recorded call and asked her why she had done it. He asked her, "'Why did you burn my shit[?]'". Defendant responded, "'[']Cause I told you.'"

DISCUSSION

I. Law

Section 1385 grants trial courts the discretion to dismiss a prior strike conviction if the dismissal is in furtherance of justice. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at pp. 529-530.)⁴ A defendant bears the burden of clearly showing the trial court's decision not to do so was arbitrary or irrational. Absent such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives. (*Carmony, supra*, at pp. 376-377.)

"'A court's discretion to strike [or vacate] prior felony conviction allegations [or findings] in furtherance of justice is limited. Its exercise must proceed in strict compliance with ... section 1385[, subdivision] (a).'" (*People v. Williams* (1998) 17 Cal.4th 148, 158.) The Three Strikes law "was intended to restrict courts' discretion in sentencing repeat offenders." (*Romero, supra*, at p. 528; *People v. Garcia* (1999) 20 Cal.4th 490, 501 ["a primary purpose of the Three Strikes law was to restrict judicial discretion"].) The Three Strikes law establishes "'a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike,'" *unless* the sentencing court finds a reason for making an exception to this rule. (*Carmony, supra*, 33 Cal.4th at p. 377.) There are "stringent standards that sentencing courts must follow in order to find such an exception." (*Ibid.*) In order to dismiss a prior strike conviction,

⁴ A defendant's request for this type of leniency is commonly referred to as a "Romero motion," although defendants do not actually have a right to make motions under section 1385, subdivision (a). (*People v. Carmony* (2004) 33 Cal.4th 367, 375, 379 (*Carmony*).)

“the court in question must consider whether, in light of the nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.”

(*People v. Williams, supra*, at p. 161.)

“[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, ‘the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce [] an “arbitrary, capricious or patently absurd” result’ under the specific facts of a particular case. [Citation.] [¶] But ‘[i]t is not enough to show that reasonable people might disagree about whether to strike one or more’ prior conviction allegation.... Because the circumstances must be ‘extraordinary ... by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary. Of course, in such an extraordinary case—where the relevant factors ... manifestly support the striking of a prior conviction and no reasonable minds could differ—the failure to strike would constitute an abuse of discretion.”

(*Carmony, supra*, 33 Cal.4th at p. 378.)

II. Background

According to the probation officer’s report in this case, defendant’s criminal history began when she was about 18 years old and included convictions for misdemeanor carrying a concealed weapon in a vehicle in 1995; misdemeanor theft of

personal property in 1998; and assault with a firearm in 2002, in which she shot another woman in the neck due to a jealous confrontation over a man. Regarding the 2002 conviction, the probation officer stated:

“According to Oakland PD report ..., on October 24, 2001, at approximately 5:30 p.m., [defendant] shot victim Shirelle C. Shirelle sustained a gunshot wound to the neck. Further investigation revealed that the two women had several contacts/arguments prior to the shooting. Witnesses at the scene reported that the prior confrontations stemmed from Shirelle’s belief that [defendant] had a relationship with Shirelle’s boyfriend (prior to his recent death).

“According to the defendant, the incident was due to ‘jealousy. People jumped me, kidnapped me, and robbed me. I couldn’t make a police report. They found out where my daughter went to school.’ She advised once they threatened her child, she took matters into her own hands.”

Lastly, defendant was convicted of burglary in 2003. She was paroled in 2005 and then discharged from parole on July 4, 2008. About 2.5 years later, at the age of 35, she committed the crimes in the present case.

The probation officer concluded:

“Despite all prior attempts at rehabilitation through probation, the defendant was previously incarcerated for an assault with a firearm. While she appeared to perform well on parole, she re-offended in the present matter, [breaking] into her boyfriend’s apartment and setting fire to his bedroom. As exhibited in her prior record, she clearly has issues with weapons. In the present matter, she was angered by the victim’s actions, made and sent threatening calls and texts, and then entered his home to set a fire.

“The defendant has demonstrated she poses a threat to the safety of others. She expressed no remorse, viewed herself as the victim, and diminished the seriousness of the offense. Therefore, it is respectfully recommended that probation be denied and that the defendant be committed to the California Department of Corrections and Rehabilitation. As factors in aggravation prevail, the aggravated terms are recommended. As to Count One, the aggravated term of eight years, doubled pursuant to PC 667(e)(1), for 16 years, and further enhanced by five years, pursuant to

PC 667(a)(1), for 21 years is recommended. As to Count Two, the aggravated term of six years, doubled pursuant to PC 667(e)(1), for 12 years, to be stayed pursuant to PC 654. The aggregate term of incarceration is 21 years.”

On January 7, 2014, defendant submitted a written *Romero* motion, requesting that the trial court dismiss her 2002 strike conviction for assault with a firearm.

At the sentencing hearing on April 4, 2014, defense counsel argued that *Romero* applied in this case because the prior strike conviction was over 10 years old.

The prosecutor argued that the prior strike conviction involved shooting someone in the neck, which was not a minor offense as defendant had characterized it. The prosecutor stressed that defendant again took matters into her own hands in the current case. Her actions were even more dangerous because three apartments containing potential victims were attached to Green’s apartment.

The trial court denied defendant’s *Romero* motion, as follows:

“ ... [Defendant] has shown a consistent pattern of criminal behavior. There may be gaps between these times. Possibly some of those gaps are due to incarceration, last of which she was discharged in July of 2008. This offense occurred in 2011, if I’m not mistaken. [¶] ... [¶]

“ ... It appears to me that the pattern here is where [defendant] wants to help herself to whatever it is that she believes she’s entitled to, whether it is to a boyfriend, whether it is to property, whether it is to release her own pent-up frustration against a man who may have rejected her or wanted her or didn’t want her, whatever the reasoning. There is a clear pattern of someone who does not control her impulses and does what she believed is her right to do. And just as she was characterized in that former case of saying she had to take matters into her own hands, once again, in this case that’s evident. The facts that were found by the jury [are], in fact, just that; that she took matters into her own hands to resolve a conflict that she experienced with the man in question in this particular case. Her continued criminal behavior is escalating. It’s not going in a direction where less people are being endangered. If anything, more people are being endangered. And at this time, the Court does not find that she is a candidate for the Court to exercise *Romero*. The *Romero* request, therefore, is denied.”

III. Analysis

Defendant now contends the trial court abused its discretion when it refused to dismiss the 2002 strike conviction because she was 36 years old and had a limited criminal past with only four convictions, two of which were misdemeanors. Furthermore, only one of the two felonies was violent. Her previous convictions were remote in time, the most recent occurring in 2003. She also argues that her current crimes were driven by her intoxication and impaired judgment. She claims she was mentally distressed and not in her right mind at the time. She notes that the trial court was apparently prepared to accept a 10-year plea bargain before trial, but she was not wise enough to accept the offer. She maintains the facts demonstrated that her 15-year prison sentence was unwarranted and excessive. For these reasons, she argues the trial court abused its discretion in refusing to dismiss the prior strike conviction.

As we have observed in other cases, this is not the extraordinary case imagined by *Carmony*, where there can be no doubt that the defendant, although a career criminal, nevertheless falls outside the spirit of the Three Strikes law. (*Carmony, supra*, 33 Cal.4th at p. 378.) As the trial court stated, defendant's criminal background, which included shooting another woman because of a man, and the circumstances of her current crimes, which included setting a man's home on fire when he rejected and frustrated her, show a pattern of resolving conflicts in whatever violent or destructive way suits her, rather than controlling her impulses and dealing with conflicts in acceptable ways. The arson placed many potential victims at risk of death due to the physical connection between the apartments and the late hour of the fire. Defendant has not shown that she falls outside the spirit of the Three Strikes law or that the trial court's ruling was "so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) Accordingly, we conclude the trial court did not abuse its discretion in refusing to dismiss the prior strike conviction.

DISPOSITION

The judgment is affirmed.